

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

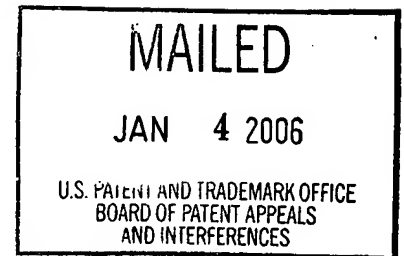
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LEONARD R. SOKOLA, SR.

Appeal No. 2006-0288
Application 10/611,765

ON BRIEF



Before PAK, WARREN and TIMM, *Administrative Patent Judges*.

WARREN, *Administrative Patent Judge*.

Decision on Appeal and Opinion

We have carefully considered the record in this appeal under 35 U.S.C. § 134, and based on our review, find that we cannot sustain the grounds of rejection advanced on appeal:

claims 1 through 5, 7 and 10 through 12 stand rejected under 35 U.S.C. § 102(b) as anticipated by Buj (answer, page 4);

claim 16 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Buj (answer, page 4);

claims 17 and 18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Buj in view of Gruneisen (answer, page 4);

claims 13, 19 and 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Buj in view of Brownell (answer, pages 4-5); and

claims 1, 10, 13, 19 and 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Brownell in view of Buj and Gruneisen (answer, page 5).^{1,2}

We refer to the answer and to the brief for a complete exposition of the positions advanced by the examiner and appellant.

It is well settled that in order for the examiner to establish a *prima facie* case of anticipation, each and every element of the claimed invention, arranged as required by the claim, must be found in a single prior art reference, either expressly or under the principles of inherency. *See generally, In re Schreiber*, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997); *Diversitech Corp. v. Century Steps, Inc.*, 850 F.2d 675, 677-78, 7 USPQ 1315, 1317 (Fed. Cir. 1988); *Lindemann Maschinenfabrik GMBH v. Am. Hoist and Derrick*, 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed. Cir. 1984).

It is also well settled that in order to establish a *prima facie* case of obviousness under § 103(a), the examiner must show that some objective teaching, suggestion or motivation in the applied prior art taken as a whole and/or knowledge generally available to one of ordinary skill in this art would have led that person to the claimed invention as a whole, including each and every limitation of the claims arranged as required by the claims, without recourse to the teachings in appellant's disclosure. *See generally, In re Rouffet*, 149 F.3d 1350, 1358, 47 USPQ2d 1453, 1458 (Fed. Cir. 1998); *Pro-Mold and Tool Co. v. Great Lakes Plastics, Inc.*, 75 F.3d 1568, 1573, 37 USPQ2d 1626, 1629-30 (Fed. Cir. 1996); *B.F. Goodrich Co. v. Aircraft Braking Sys. Corp.*, 72 F.3d 1577, 1582, 37 USPQ2d 1314, 1318 (Fed. Cir. 1996); *In re Fine*, 837 F.2d 1071, 1074-76, 5 USPQ2d 1596, 1598-1600 (Fed. Cir. 1988); *In re Dow Chem. Co.*, 837 F.2d 469, 473, 5 USPQ2d 1529, 1531 (Fed. Cir. 1988); *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

¹ See the appendix to the brief filed June 9, 2005. Claims 6, 8, 9, 14, 15 and 21 through 23 have been withdrawn from consideration by the examiner under 37 CFR § 1.142(b). Claims 1 through 23 are all of the claims in the application.

² Appellant presents arguments respecting the objection to the amendments to the specification and to the drawings set forth in the final rejection mailed December 8, 2004 (brief, pages 3-4 and 6-9). As the examiner points out (answer, page 3), these matters are petitionable and thus, not reviewed on appeal. *See Manual of Patent Examining Procedure* §§ 1002.02(c) and 1201 (8th ed., Rev. 2, May 2004; 8th ed., Rev. 3, August 2005).

The principal issue in this appeal involves the limitation of appealed independent claim 1, on which all other appealed claims depend, specifying “a graphical diet reminder on the upper surface” of “a shallow container.” We determine from the specification (e.g., pages 1-2 and 5-6) that the terms in the subject language in context would have their ordinary meaning to one of ordinary skill in this art, and thus, the shallow container can be a plate having on its upper surface any reminder with respect to one’s diet that is communicated in graphical form. *See, e.g., In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364, 70 USPQ2d 1827, 1830 (Fed. Cir. 2004); *In re Morris*, 127 F.3d 1048, 1054-55, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997); *In re Zletz*, 893 F.2d 319, 321-22, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989).

We agree with appellants that the record before us does not contain evidence supporting the finding of the examiner that the spoon 3 and fork 6, each having a toy figure, as positioned on plate 1 of Buj constitute a disclosure which meets the subject limitation of claim 1. Indeed, we find as a matter of fact that Buj discloses no more than that the spoon and fork serve the function of influencing a child to take the food from the plate and bring it to his/her mouth (e.g., col. 1, ll. 51-55, col. 1, l. 64, to col. 2, l. 1, col. 2, ll. 24-31 and 56-68, and col. 3, l. 26, to col. 4, l. 2). Accordingly, in the absence of an explanation or evidence adduced by the examiner establishing that the spoon and fork on the plate of Buj in fact meet the subject claim limitation, we find that the examiner has not established that Buj *prima facie* in fact anticipates appealed claims 1 through 5, 7 and 10 through 12, within the meaning of § 102(b). For the same reason, Buj fails to supply the factual foundation for a *prima facie* case of obviousness under § 103(a) of appealed claims 16 through 18, which also contain the subject limitation, and the combination thereof with Grunesien does not cure the deficiency.

With respect to the grounds of rejection of appealed claims 1, 10, 13 and 17 through 20 under § 103(a) which involve the combined teachings of Buj and Brownell, like appellant, we cannot agree with the examiner’s findings and conclusions that “Brownell teaches a food pyramid shaped plate” since “Brownell shows a pictorial representation of a food pyramid (see ‘OTHER PUBLICATIONS’ section of patent cover),” which listing of references includes “a food pyramid reference providing a connection between the triangular shape of the plate and the triangular shape of representations of the food pyramid,” and thus, that “Brownell is a pictorial

representation of a food pyramid, it is a graphical diet reminder, it is on the central section” (answer, pages 4-5 and 7-8). While the design of the compartmentalized plate disclosed by Brownell resembles a “pyramid,” there is no graphical or other communication on the plate *per se* to the effect that the same in fact represents any manner of “food guide pyramid,” and Brownell provides no such disclosure. The examiner has provided no other evidence or explanation establishing that the compartmentalized plate of Brownell would have been recognized as a graphical reminder of such pyramid.

Thus, in the absence of an explanation or evidence in the record establishing that the compartmentalized plate disclosed by Brownell would have reasonably suggested “a graphical diet reminder” to one of ordinary skill in this art, we find that even if this person would have combined the teachings of Buj and Brownell, the result would have been a compartmentalized plate with accompanying eating utensils wherein each piece has a toy figure thereon, which does not meet the subject limitation of the appealed claims. *See Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1050-54, 5 USPQ2d 1434, 1438-41 (Fed. Cir. 1988).

The examiner's decision is reversed.

Reversed


CHUNG E. PAK
Administrative Patent Judge


CHARLES F. WARREN
Administrative Patent Judge

BOARD OF PATENT APPEALS AND INTERFERENCES


CATHERINE TIMM
Administrative Patent Judge

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RatnerPrestia
P.O. Box 1596
Wilmington, DE 19899